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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK WILLIAM THOMAS, Defendant and Appellant.	E045983 (Super.Ct.No. RIF134388) **OPINION**

APPEAL from the Superior Court of Riverside County. David Minier* and Helios J. Hernandez, Judges. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General.

* Retired judge of the Madera Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A jury found defendant guilty of possession of methamphetamine (Health & Saf. Code, § 11378). Thereafter, the jury found true that defendant had sustained six prior prison terms (Pen. Code, § 667.5, subd. (b)) and three prior strike convictions (Pen. Code, §§ 667, subds (c) & (e)(2)(A), 1170.12, subd. (c)(2)(A)). The jury also found true the four sentencing aggravating factors. After the court struck one of the prior strike allegations, defendant was sentenced to a total term of 31 years to life in state prison. On appeal, defendant contends (1) the prosecutor committed misconduct during cross-examination; (2) the trial court abused its discretion in declining to dismiss another prior strike conviction; and (3) his sentence constitutes cruel and unusual punishment under the state and federal Constitutions. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND

On January 18, 2007, around 10:00 p.m., Riverside County Sheriff's Department Sergeant Richard Heard went to the Best Western Hotel in Moreno Valley, which was known as a location to purchase drugs, to investigate possible drug activity. When the officer entered the lobby, he immediately recognized defendant, who was sitting in the lobby watching television. Defendant appeared to be under the influence of methamphetamine. Sergeant Heard located defendant's hotel room key in his right front pocket and proceeded to the room with defendant and two other deputies. In a tin box located on the bathroom counter in defendant's hotel room, the officers found four bags of methamphetamine, a mirror, a razor blade, a digital scale, and 180 baggies. It did not

appear to Sergeant Heard that anyone else was staying in the hotel room. When defendant heard the sergeant tell another deputy he had located the tin box, defendant stated, "I prefer you not take that."

At the police station, after defendant waived his constitutional rights, in response to Sergeant Heard's question of why he had the items, defendant responded, "I sell dope. I sold dope today. I've been selling since the 70s." Defendant never indicated that someone else was staying in his room or had access to his room and never denied the items were his.

Based on the amount of methamphetamine, the scale, and the baggies found in defendant's hotel room, and the fact defendant appeared to be under the influence of methamphetamine, an expert opined the methamphetamine was possessed for sale.

Defendant's defense was that the methamphetamine belonged to a White female who had access to his room. Julio Casas, a California Housing Patrol employee, testified on behalf of the defense and claimed that he saw defendant sitting in the lobby watching television alone and that it did not appear defendant was under the influence of a drug. Casas also stated that he had seen defendant with a White woman holding grocery bags in front of his room; she had asked for defendant on the night of the incident. However, he never saw defendant and the woman go into the room together.

Faby Contreras, an assistant manager at the hotel, stated that he had checked defendant into a room between 1:00 p.m. and 3:00 p.m. on the day of the incident.

Defendant was with a White female and charged for a double-occupancy room but had been given only one key.

Defendant testified on his own behalf and stated that he had began using methamphetamine in the 1980's, but since being released from prison in November 2005, he had only used it five times. One such instance took place the day before the incident, on January 17, 2007. On that day, the police had arrested him at the Best Western for being under the influence of methamphetamine, and he had been taken to jail. He had been released from jail about 11:30 a.m. on January 18 and had returned to the hotel about 4:30 p.m. with Michelle Garcia. They went to the front desk, where defendant checked in for a second night and given a second key. Defendant still had a key to his motel room from the day before.

Defendant and Garcia went to the room for a few minutes. Garcia was carrying a purse and a tin box. Garcia left the tin box in the room, and they left. Defendant claimed that Garcia never opened the tin box in front of him, never told him what was in it, and never asked him to keep it in a safe place Defendant asserted that he had never used methamphetamine with Garcia and did not know if she used or sold drugs.

While Garcia went to her car, defendant went to the lobby to watch television. Garcia returned after a couple of hours. He saw Garcia leave the motel lobby around 9:00 p.m. and did not see her again that night. About 45 minutes later, the police stopped him in the courtyard of the hotel. He claimed that he was not under the influence of methamphetamine.

Four deputies then searched his room. Defendant claimed that after the sergeant had located the tin box, he had asked defendant what defendant wanted him to do with the tin box. Defendant told him the box did not belong to the sergeant and that he should put it back. Defendant denied possessing the tin box and its contents and asserted that it belonged to Garcia. He also denied being questioned at the police station regarding the methamphetamine and denied telling the sergeant the drugs were his or that he sold drugs.

Defendant admitted to having been convicted of burglary, grand theft, assault with a deadly weapon three times, possession of a firearm by a felon, possession of a controlled substance, and second degree robbery.

II

DISCUSSION

A. *Prosecutorial Misconduct*

Prior to defendant's testimony, defense counsel requested the court to order the prosecutor to refrain from asking defendant about the veracity of the prosecution witnesses, the so-called "were they lying" questions. The court agreed, stating, "I will certainly sustain an objection. I know that attorneys do that all the time, and it's improper." The prosecutor stated, "That's fine."

On cross-examination, the prosecutor asked defendant if he had remembered Contreras checking him into the hotel. Defendant said he did not. The prosecutor then asked defendant whether he was saying that "Ms. Contreras did not check [him] in on

January 18, 2007 . . . ." Defendant replied, "Yes." The prosecutor then asked, "So her testimony yesterday would be untruthful?" The court sustained defendant's immediate objection.

Later, the prosecutor attempted to reference an investigator's testimony to provide context to questioning defendant about why he was not in his hotel room. The prosecutor asked, "[Y]ou heard Investigator Bender testify yesterday, correct, the expert that came on and testified, the meth?" Defense counsel objected on relevance and the court sustained the objection.

The prosecutor then asked, "Well, you heard him testify that drug dealers, when they're selling out of motel rooms --" Defense counsel again objected on relevance, and the court again sustained the objection.

Later in the cross-examination, the prosecutor asked defendant about the purported statements he made to Sergeant Heard and asked defendant whether he was saying that "Sergeant Heard was being untruthful when he said that [defendant said he sold dope]." Defense counsel immediately objected and asked for a continuing objection and a sidebar conference. After the sidebar, the prosecutor moved onto a different question.

Defendant contends the prosecutor committed prejudicial misconduct by continuing to ask the so-called "were they lying" questions.

Under federal law, a prosecutor's improper remarks or questions constitute misconduct if they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright* (1986) 477 U.S.

168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves """the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.) "Misconduct that infringes upon a defendant's [federal] constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury's verdict. [Citations.] A violation of state law only is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward [conduct]. [Citations.]" (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

The propriety of "were they lying" questions was recently addressed by our Supreme Court in *People v. Chatman* (2006) 38 Cal.4th 344 (*Chatman*). In *Chatman*, the prosecutor repeatedly asked the defendant whether certain witnesses were lying and whether they had a reason to lie. (*Id*. at pp. 378-379.) On appeal the defendant claimed "the questions 'invaded the province of the jury,' elicited improper lay opinion about the veracity of witnesses, and constituted misconduct by intentionally eliciting inadmissible testimony."[1] (*Id*. at p. 379.) In rejecting the defendant's arguments, the Supreme Court

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[1] Although the *Chatman* court questioned "whether this issue is properly considered one of misconduct" (*Chatman*, *supra*, 38 Cal.4th at p. 379) as opposed to "the erroneous admission of evidence," it concluded the "defendant's argument [was] essentially identical under either characterization." (*Id*. at p. 380.)

provided general guidelines regarding "were they lying" questions. (*Id*. at pp. 380-383.) Such queries are "legitimate inquiry" if they call for testimony that would properly help the jury to determine credibility. (*Id*. at pp. at p. 383.) A defendant's testimony may assist a jury because a "defendant who is a percipient witness to the events at issue" or who "knows the other witnesses well" may "be able to provide insight on whether witnesses . . . are intentionally lying or are merely mistaken." (*Id*. at p. 382.)

For example, in *Chatman*, the prosecutor properly asked the defendant whether he "knew of facts that would show a witness's testimony might be inaccurate or mistaken, or whether he knew of any bias, interest, or motive for a witness to be untruthful." (*Chatman, supra,* 38 Cal.4th at p. 383.) It was also permissible for the prosecutor to clarify the defendant's "own position" on whether his testimony differed from that of other witnesses because "he had a better vantage point from which to observe an event . . . , [because] his memory [was] superior to one who was inattentive," or because the other witnesses were lying. (*Ibid*.; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1126 [prosecutor does not commit misconduct by assuming witnesses "might have been lying and [seeking] possible explanations for their false testimony from defendant"]; *People v. Tafoya* (2007) 42 Cal.4th 147, 179 ["by choosing to testify, defendant put his own veracity in issue," and the "prosecution's [were they lying] questions allowed defendant to clarify his position and to explain why [a codefendant and an eyewitness] might have a reason to testify falsely"].)

On the other hand, "were they lying" queries are improper if they are merely argumentative. (*Chatman*, *supra*, 38 Cal.4th at pp. 381, 384.) In *Chatman*, the prosecutor asked the defendant how the safe at a store was opened. (*Id*. at p. 379.) The defendant replied that "he could not say; he never touched the safe," eliciting the prosecutor's query, "'Well, is the safe lying about you?'" (*Ibid*.) The Supreme Court held the question of whether an inanimate object was "lying" was argumentative, defining argumentative inquiry as "speech to the jury masquerading as a question" that "does not seek to elicit relevant, competent testimony, or often any testimony at all." (*Id*. at p. 384.)

Equally improper are "were they lying" questions calling for "irrelevant or speculative" testimony (*Chatman*, *supra*, 38 Cal.4th at p. 384), such as the prosecutor's queries in *People v. Zambrano* (2004) 124 Cal.App.4th 228. There, undercover officers testified they arrested the defendant after he sold them cocaine. (*Id*. at p. 233.) The defendant testified to a totally different version of events, asserting an officer simply "walked up to him, said something he did not understand, put a gun to his neck, threw him on the ground, and handcuffed him." (*Ibid*.) The Court of Appeal held "the prosecutor's 'were they lying' questions were inadmissible because they were irrelevant to any issue in [the] case," since the "questions did not clarify defendant's prior testimony" and "merely forced defendant to opine, without foundation, that the officers were liars." (*Id*. at pp. 240-241.) The court concluded, "The questions served no purpose other than to elicit defendant's inadmissible lay opinion concerning the officers'

veracity." (*Id*. at p. 241.) *Chatman* approved the *Zambrano* holding and stated the *Zambrano* defendant, as "a stranger to the officers, had no basis for insight into their bias, interest, or motive to be untruthful" or for attributing the differences in testimony "to mistake or faulty recall." (*Chatman, supra*, 38 Cal.4th at p. 381.)

We find the prosecutor's "were they lying" questions here were proper. Defendant's and Contreras's testimony were in direct conflict as to defendant's arrival at the hotel. Contreras testified defendant would have been there by 3:00 p.m.; defendant said he did not arrive until 4:30 p.m. Since this fact was in dispute, the prosecutor could properly ask defendant questions to determine if Contreras was lying or merely mistaken. Defendant was a percipient witness to his encounter with the hotel clerk, and the questions would have elicited relevant testimony to assist the jury in making a credibility determination between defendant and Contreras. Defendant's testimony assisted the jury in determining the accuracy of Contreras's observations. Essentially, defendant adopted the position that "he had a better vantage point from which to observe an event, or that his memory [was] superior to one who was inattentive . . . ." (*Chatman, supra*, 38 Cal.4th at p. 383.) This testimony helped the jury assess the relative credibility of defendant compared to that of Contreras. The testimony was a proper aid to the jury in deciding whom to believe.

In regard to the questions concerning his statements to Sergeant Heard, defendant again was a percipient witness to his encounter with the sergeant and to the words defendant exchanged with him. As such, defendant had a bias for insight into a possible

motive for Sergeant Heard to lie. By expressly denying that he had admitted possessing and selling drugs to the sergeant on direct and cross-examination, defendant placed the reliability of the statements and credibility of the testimony in dispute. This testimony enabled the jury to weigh the credibility of defendant's version of the encounter against that of the sergeant, and was thus permissible.

There was no evidence to suggest that the prosecutor used the "were they lying" questions to berate defendant before the jury or to force him to call the witnesses liars in an attempt to inflame the passions of the jury. (See *People v. Zambrano, supra*, 124 Cal.App.4th at p. 242.)

Even if we assume, for the sake of argument, that the prosecutor committed misconduct based on essentially the two improper questions, the misconduct was relatively benign in terms of its likely impact on the jury's verdict. Even considered cumulatively, the effect of any misconduct here merely gave a slight additional emphasis to the obvious disparity between the strength of the prosecution's case and the weakness of the defense case. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 757, 759-761 [prosecutor's improper vouching for witnesses and his appeal to passions of the jury were misconduct but were not prejudicial because none of the misconduct was serious enough, even in the aggregate, to prejudice defendant]; *People v. Zambrano, supra*, 124 Cal.App.4th at p. 243 [prosecutor's repeated "were they lying" questions were misconduct but were not prejudicial in light of defendant having already destroyed his own credibility with patently unreasonable testimony].)

B. *Motion to Strike Prior*

Defendant next argues the trial court abused its discretion by refusing to dismiss a second prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. We disagree.

A trial court's decision to not dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citation.] Second, a '"decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'"' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 and *People v. Preyer* (1985) 164 Cal.App.3d 568, 573; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309.)

"In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378, citing *People v. Langevin* (1984) 155 Cal.App.3d 520, 524 and *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance. [Citation.]" (*People v. Myers*, *supra*, 69 Cal.App.4th at p. 310.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v.*

Carmony, *supra*, 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

The touchstone of the analysis must be "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, 17 Cal.4th 148, 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A decision to dismiss a strike allegation based on its remoteness in time is an abuse of discretion where the defendant has not led a life free of crime since the time of his conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

Defendant contends the court should have granted his request to strike a second one of his prior strike convictions because his current crime was "minor" and because of his age (52).

We cannot conclude the trial court abused its discretion in declining to strike another one of defendant's prior strike convictions. The court struck his 1975 juvenile prior but denied defendant's request to strike a second strike after analyzing the *Williams* factors. The relevant considerations supported the trial court's ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant's personal and criminal background. In fact, the record clearly shows the court

was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately applied the factors as outlined in *Williams*.

This case is far from extraordinary. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. Though his current crime can be characterized as nonviolent, defendant does have a violent and serious prior record of criminal behavior beginning when he was a juvenile. His life of crime began back in 1974, and since then he has been in and out of prison, having committed numerous felony and misdemeanor offenses and having repeatedly violated parole. Defendant's felony convictions include burglary, grand theft, assault with a deadly weapon three different times, possession of a firearm by a felon, and possession of a controlled substance. In fact, defendant's criminal record shows that he has spent most of the last 35 years in the criminal justice system and repeatedly committed crimes and violated his parole and probation.

The court here could not overlook the fact defendant continued to commit serious criminal offenses and violate the terms and conditions of his probation and parole even after repeatedly serving time in prison. His conduct as a whole was a strong indication of unwillingness or inability to comply with the law. He has also shown a proclivity for weapons and violent behavior through his prior conduct. Finally, he has shown his continual disregard for the law as evidenced by his continual parole and probation violations and criminal convictions. It is clear from the record that prior rehabilitative efforts have been unsuccessful for defendant. Indeed, defendant's prospects for the

future look no better than the past, in light of defendant's record of prior offense and reoffense. All of these factors were relevant to the trial court's decision under *Romero*; there is no indication from the record here that the court failed to consider the relevant factors or that it failed to properly balance the relevant factors or that it abused its discretion in determining that, as a flagrant recidivist, defendant was not outside the spirit of the three strikes law. (*Williams*, *supra*, 17 Cal.4th 148, 161.)

Indeed, defendant appears to be "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Thus, given defendant's continuous criminal history, his numerous parole and probation violations, the seriousness of the past and present offenses, and his seemingly dim prospects for rehabilitation and lack of meaningful crime-free periods, we cannot say that the trial court abused its discretion when it declined to dismiss another one of defendant's prior strike convictions. The trial court's decision not to strike defendant's priors was neither irrational nor arbitrary.

C. *Cruel and Unusual Punishment*

Lastly, defendant contends his sentence of 31 years to life for possession of methamphetamine constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution, and cruel or unusual punishment under article I, section 17 of the California Constitution. We disagree.

The People respond that defendant forfeited or waived his claim by failing to assert it in the trial court. Several published decisions have found waiver of a criminal

defendant's claim of cruel and/or unusual punishment. (E.g., *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27 (*DeJesus*).) In each case, however, the court went on to address the claim. Moreover, *Kelley* simply cited *DeJesus*, without any substantive discussion of the waiver issue. However, *DeJesus* is questionable authority for a blanket rule of waiver of cruel and/or unusual punishment claims.

First, the specific question in *DeJesus* was whether the trial court should have considered its discretion under *People v. Dillon* (1983) 34 Cal.3d 441 to reduce a conviction of first degree murder based on cruel and unusual punishment. *DeJesus* reasoned that " . . . *Dillon* makes clear that its holding was premised on the unique facts of that case. [Citation.] Since the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court." (*DeJesus*, *supra*, 38 Cal.App.4th at p. 27.) In contrast, where the issue is merely whether a sentence is cruel and/or unusual punishment, there normally are no "fact specific" issues. Rather, "'[w]hether a punishment is cruel or unusual is a question of law for the appellate court . . . .'" (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1390.)

Second, the Supreme Court has stated with respect to sentencing claims, "In essence, claims deemed waived on appeal involve sentences which, though *otherwise permitted by law*, were imposed in a procedurally or factually flawed manner." (*People v. Scott* (1994) 9 Cal.4th 331, 354, italics added.) It is at least arguable that a sentence that constitutes cruel and/or unusual punishment is not one "otherwise permitted by law"

but simply imposed in a procedurally or factually flawed manner. *DeJesus* did not consider that question.

Finally, as *DeJesus* itself recognized, it is appropriate to consider even an issue that has been waived "in order to 'forestall a subsequent claim of ineffectiveness of counsel'" for failure to raise the issue. (*DeJesus*, *supra*, 38 Cal.App.4th at p. 27.)

Rare is the punishment that does not survive a gross disproportionality analysis. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1193.) A sentence may constitute cruel or unusual punishment under the state Constitution if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) In analyzing a disproportionality claim under the state Constitution, we examine (1) "the nature of the offense and offender, with particular regard to the degree of danger both present to society" (*Lynch*, at p. 425), (2) the sentence compared to the sentences for more serious offenses in California (*id.* at p. 426), and (3) the sentence compared to sentences for the same offense in other states (*id.* at p. 427). (See also *People v. Dillon*, *supra*, 34 Cal.3d at p. 479.) "This three-pronged analysis provides guidelines for determining whether a punishment is cruel or unusual. The importance of each prong depends on the facts of each case. An examination of the first prong alone can result in a finding of cruel or unusual punishment. [Citations.] Regarding the other prongs, defendant bears the burden of proof. [Citation.]" (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 88.)

The California Supreme Court has also held that, provided a punishment is proportionate to the defendant's individual culpability (what the court referred to as "intracase proportionality"), there is no requirement it be proportionate to the punishments imposed in other similar cases (what the court dubbed "intercase proportionality"). (*People v. Webb* (1993) 6 Cal.4th 494, 536; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Miller* (1990) 50 Cal.3d 954, 1010.) In other words, a determination of whether a punishment violates the state constitutional prohibition against cruel and unusual punishment may be based solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) Hence, to determine whether a sentence is cruel and unusual under the state Constitution, it is not necessary to conduct a comparative sentence review of similar cases in California and other jurisdictions as long as the sentence is proportionate to the defendant's individual culpability. (*Webb*, at p. 536.)

The Eighth Amendment of the federal Constitution also includes a narrow proportionality protection against grossly disproportionate sentences. (*Ewing v. California* (2003) 538 U.S. 11, 20 [123 S.Ct. 1179, 155 L.Ed.2d 108] (plur. opn. of O'Connor, J.) (*Ewing*).) However, the constitutional protection against grossly disproportionate sentences applies only in the "'exceedingly rare'" and "'extreme'" case. (*Id*. at p. 21). For example, in *Ewing*, the United States Supreme Court concluded the Eighth Amendment did not prohibit a sentence of 25 years to life under California's three

strike law for a repeat offender who shoplifted golf clubs worth about $1,200 and whose prior convictions included three residential burglaries and one first degree robbery. (*Ewing*, at pp. 17-18, 29-30.) Indeed, defendant's sentence is not disproportionate to his culpability. (See *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-67, 73-74 [123 S.Ct. 1166, 155 L.Ed.2d 144] [two consecutive terms of 25 years to life for third strike conviction involving two thefts of videotapes not cruel and unusual punishment].)

Here, we cannot say that the application of the three strikes law to defendant's present felony offense and past recidivism, as described in his probation report, violates the Eighth Amendment. In reaching this conclusion, we reject defendant's attempts to equate his case with others, including *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755 (*Ramirez*), where courts have found a sentence under the three strikes law to be extreme enough to violate the Eighth Amendment. In *Ramirez*, for example, the Ninth Circuit concluded that a habeas petitioner's 25-year-to-life sentence under California's three strikes law violated the Eighth Amendment because it was extreme when compared to the gravity of the most recent offense and the defendant's criminal history. (*Ramirez*, at p. 767.) Although defendant argues his case is similar to that of the defendant in *Ramirez*, our review of the Ninth Circuit's fact-specific analysis shows defendant's case is easily distinguishable. Most significantly, the triggering offense in *Ramirez* was shoplifting with "no report of any force or violence . . . ." (*Id*. at p. 757.) The petitioner "surrendered without resistance, admitted his crime, and returned the VCR" to the store. (*Id*. at p. 758.) His entire criminal history consisted of two other nonviolent shoplifting

incidents obtained through a single guilty plea with a total sentence of one year in county jail and three years' probation. (*Id*. at pp. 768-769.) For the reasons outlined in the previous discussion and the facts of this case, it is obvious that the triggering offense and criminal history at issue in this case are considerably more serious, indicating defendant poses a greater risk to the public.

We must also reject defendant's argument his sentence is grossly disproportionate when compared with punishments in other jurisdictions for the same crime and in California for more serious offenses, such as murder and kidnapping for rape or robbery. "[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.)

"California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders. [Citation.]" (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338.) "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.'

[Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.